JD(ATL)–23–15
Doral, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UPS SUPPLY CHAIN SOLUTIONS, INC.

and **Case 12–CA–144578**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 769

Marnelly Maldonado, Esq.,
for the General Counsel.
Jonathan L. Sulds, Esq. and
Angela F. Ramson, Esq.,
for the Respondent.
Noah Scott Warman, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA DAWSON, Administrative Law Judge. This case was tried in Miami, Florida, on August 10 and 11, 2015. The Charging Party, International Brotherhood of Teamsters, Local Union No. 769 (the Union), filed the charge in this case on January 16, 2015. The General Counsel issued the complaint on May 28, 2015, against UPS Supply Chain Solutions, Inc. (Respondent/SCS). The complaint alleges that on January 1, 2015, Respondent unilaterally implemented and maintained changes to bargaining unit employees' health benefits without bargaining to a good-faith impasse with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent in its answer denied having violated the Act in any way alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and

after fully considering the briefs filed by the General Counsel and the Union,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a subsidiary of United Parcel Service (UPS), has been a Delaware corporation, with a principal office and place of business in Atlanta, Georgia, and other places of business located throughout the Unites States, including its facility in Doral, Florida (the facility), where it engages in the business of providing transportation and freight services. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I also find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union's Certification and Lack of an Initial Collective-Bargaining Agreement

On April 29, 2013, the National Labor Relations Board (the Board) certified the Union as the exclusive collective-bargaining representative of the following unit at its Doral, Florida facility (the facility):

> All regular full-time and part-time warehouse operations employees employed in the following job classifications: warehouse II and III; senior warehouse; inventory control representatives; inventory control associates II; customer support representatives I; customer support representatives II; order processing representatives II and III; customer care representatives III; and administrative assistant II employed at Respondent's facility located at 3450 NW 115th Avenue in Doral, Florida; excluding all other employees, guards and supervisors as defined in the Act.

[1] On November 2, 2015, I issued an order granting Respondent's October 16, 2015 motion for leave to file reply brief. In the interim, on October 20, I issued an Order to Show Cause to the General Counsel to show why I should not allow the reply brief. The General Counsel responded on October 29. In its motion and reply brief, Respondent claimed the General Counsel briefed a theory of violation based on prior unremedied unfair labor practices and not addressed in the trial in this case. The General Counsel contends that its allegation that Respondent did not remedy unfair labor practices found by Administrative Law Judge Ira Sandron in a prior case now pending before the Board (discussed further in this decision) was alleged in and/or flowed from the complaint at issue here. I agree that it does, and that it is a legal issue appropriately addressed in the parties' briefs. However, I accepted the reply brief due to some ambiguity around the purpose of the allegation (background information versus alleged violation). I have considered all submissions, including the reply brief in making this decision. In doing so, I have provided Respondent the opportunity to address this legal issue raised in the General Counsel's brief.

SCS has approximately 10,000 employees, of whom about 37–40 are members of the unit. Respondent and the Union began negotiating towards an initial collective-bargaining agreement in about May 2013, but to date, have not reached one. They have, however, continuously engaged in bargaining sessions with some regularity, and have reached tentative agreements on at least some noneconomic issues.

B. Respondent's History Regarding Health Care Benefits

Prior to the Union's certification, and thereafter, UPS has provided its Flexible Benefits Plan (flex plan) to about 70,000 to 80,000 of its employees nationwide, including those employed by SCS.[2] Each year, with the assistance of an outside expert consultant, UPS has reviewed its benefits program against the backdrop of health care benefits offered in the industry. (Tr. 153).[3] Through 2013, Respondent sent out to its employees "an announcement of changes in health care benefits, called summary of material modifications (SMMs)." SMMs were typically issued in the September or October prior to the following January when the changes were to be implemented.[4] UPS has also issued a summary plan description (SPD) for major changes. (See e.g., R. Exh. 1). The flex plan is an employer insured plan; the company Aon Hewitt administers eligibility and enrollment for the plan. Insurers Aetna and United Healthcare administer UPS' flex plan benefits on a state-by-state basis, with United Healthcare doing so for its businesses in the state of Florida. (R. Exh. 1; Tr. 154, 158).

In 2013, after the Union's certification, UPS implemented two changes to its flexible benefits program: excluding spousal coverage if a spouse had health insurance coverage through his/her own employer and a smoker's surcharge. UPS notified its employees, including those in the unit here, and implemented the new changes on January 1, 2014. Respondent's actions resulted in issuance of a charge and subsequent complaint, which was heard by Administrative Law Judge Ira Sandron. He issued a decision, dated November 28, 2014, in which he found that Respondent violated Section 8(a)(1) of the Act by implementing the 2014 changes to the flexible benefits plan without providing the Union any notice or an opportunity to bargain. That decision is now pending before the Board, and in the interim, Respondent has not provided the remedies recommended by Judge Sandron[5]

C. Proposed 2015 Changes to Health Care Benefits

On September 19, 2014,[6] in the midst of the on-going negotiations for an initial collective-bargaining agreement, Erik S. Rodriguez (Rodriguez), outside counsel and chief negotiating agent for Respondent, notified Eduardo Valero (Valero), the Union's business agent and chief negotiator, that Respondent's flex plan sponsor had recommended plan modifications

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2 This includes a variety of different business units, including SCS, within the UPS corporate network.

3 Abbreviations used in this decision: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "C. Exh. for Company's Exhibit; "Jt. Exh. for Joint Exhibit; "GC Br." for General Counsel's Brief; "R Br." for Respondent's Brief; and "RR Br." for Respondent's Reply Brief.

4 See factual findings in case 12-CA-113671, JD (ATL)–32–14 at 3; also see e.g., R. Exh. 1.

5 Case 12–CA–113671, JD (ATL)–32–14).

6 All dates hereinafter occurred in 2014, unless otherwise indicated.

to take effect on January 1, 2015.[7] Rodriguez wrote that "[w]ithout prejudice to our position that the plan's modifications are a continuation of the status quo, we are, in the spirit of good faith and cooperation, prepared to bargain with you over the contemplated 2015 changes." He made Respondent's negotiating team available to bargain on September 25, 27, 28, 30, and/or any day during the first 2 weeks of October. (GC Exhs. 2, 3.)

By letter dated October 8, Rodriguez wrote Valero a follow-up notice setting forth the following proposed changes to the flex health plan under which all SCS employees (unit and non-unit) would be covered:

> 1. Premiums The employees' medical premium costs will increase by approximately one percent. There also will be increases in the cost of their vision and dental premiums. Employee contributions in Dental Option I will increase approximately 2% which equates to $0.33 to $1.00 per month depending on their family coverage tier. The DMO employee contribution will increase $2.25 to $5.25 per month depending on the family coverage tier.
>
> 2. Health Savings Account The $200 health care spending account seed previously available to anyone that opened or maintained a Health Savings Account (HSA) through Optum Bank will only be offered to those who are new to the Healthy Savings option or switching from the Traditional PPO option AND open an HSA through Optum Bank.
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> 3. Health Savings Account (HSA) Annual Contribution The maximum allowable annual contribution to a HSA for 2015 is $3,350 for individual coverage or $6,650 for family coverage. The maximum allowable HSA catch-up contribution for individuals age 55 and older remains an additional $1,000 per year.
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> 4. CVS Caremark Formulary Changes Beginning January 1, 2015, the Plan will adopt the standard CVS Caremark formulary, the list of approved medicines available under SCS's benefits plan. Drugs determined as excluded from the formulary will not be covered by the Plan. Preferred and non-preferred drugs will continue to be paid accordingly. Lower-cost generic alternatives will be available for many. CVS will communicate directly to those affected and their physicians, explaining the changes and advising of next steps.
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> 5. Reasonable and Customary (R&C) Limit Change The R&C limit, the amount our health plan reimburses for health care services when you use an out-of- network provider will be set at 175 percent of Medicare.
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> 6. Limitation on use of Health Coaches Weight management and nutritional guidance previously offered, but not significantly utilized, will no longer be available from Aetna or United Healthcare. Health Coaches will only be available for disease management.

[7] Rodriguez, along with Angela Ramson, outside cocounsel for Respondent, and Barbara Jill (B.J.) Dorfman, UPS' director of U.S. benefits, testified on Respondent's behalf. Valero testified for the General Counsel.

> 7. Wellness Incentives Changes Participants will receive a $150 gift card when both the health assessment and the exercise or Weight Watchers program are completed. There will no longer be separate incentives for completing each one individually.
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> 8. Critical Illness Insurance During annual enrollment, employees may elect the critical illness insurance (CII) plan on the Your Benefits Resources (YBR) website.
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> 9. New Hires Medical Option All employees hired on or after January 1, 2015, except those living in Hawaii, will be eligible for the Healthy Savings medical plan option only. [GC Exh. 4.]

On about October 9, the Union sent information requests to Respondent. Those requests were not submitted into evidence by either party, but there is no dispute that the Union requested SPDs and rate information for the 2015 flex plan changes, as well as the employer and employees' costs and contributions on a weekly and/or monthly basis.

D. Bargaining Sessions

The parties ultimately agreed to meet to negotiate Respondent's 2015 recommended modifications to the flex health plan on October 12, 17, 20, 21, and 22. Unfortunately, the parties were unable to reach an agreement regarding the proposed changes after only three sessions, each of which lasted 2–3 hours. The Union's bargaining committee included Valero and two bargaining unit employees, Juan Nunez (Nunez) and Eddie Valdez (Valdez). Rodriguez, Angela Ramson, Esq. (Rodriguez' co-counsel), Darren Jones, Esq. (UPS in-house counsel), and Jenny Schaffer, Esq. (UPS in-house counsel) represented Respondent at one or more sessions. Ramson took notes during the first two sessions, which were submitted into evidence. However, the notes for the third session, taken by Schaffer, were not. Rodriguez and Valero were the sole spokespersons for the parties, as well as the only ones present for all three bargaining sessions.

1. First bargaining session on October 12

On October 12, Rodriguez and Ramson met with Valero at Rodriguez' firm in Miami, Florida. Ramson took notes on her laptop. Valero, the only Union team member present, took shorter, handwritten notes. (GC Exh. 10; R. Exh. 2.) There is not much dispute over most of the facts, but where there is conflict, I credit Respondent's bargaining notes over those of Valero. According to Ramson, she recorded the meeting almost verbatim on her laptop, indicating with initials whether it was Rodriguez (ER) or Valero (EV) who was speaking. She credibly testified that grammatical and not substantive changes were made. Further, Respondent's notes are more detailed, and more accurately reflect the length of discussion one would expect to have taken

place within the timeframes that the parties met. [8] They were also corroborated by Rodriguez' testimony.

Rodriguez began the meeting by repeating Respondent's belief that it was not obligated to bargain over its proposed 2015 healthcare changes because of past practices. He indicated, however, that Respondent wanted to discuss them because of the charges filed over the 2014 changes. (R. Exh. 2, p. 1). [9] He asked the Union to allow Respondent to make the changes and keep its members in the flex plan, and explained that whenever there is a new bargaining unit, the unit employees usually stay in the flex plan until a new healthcare plan is negotiated. Rodriguez assured Valero that Respondent was "not trying to target anyone," as the plan "extends across thousands of UPS employees across many lines." (Id.).

Valero made it clear from the onset that the Union wanted to move its employees out of the flex plan to another plan, or to return to the same flex plan terms in place prior to the 2014 changes. (R. Exh. 2). He admitted, and Respondent's notes reflect, that he expressed the Union's desire to bargain the entire contract "not separate bargaining. . . . We do not want changes and want it to stay the same until we bargain for new insurance. Depending on negotiations back and forth we are looking to take Union out of the current plan." (Tr. 76-78; R. Exh. 2).

Rodriguez pointed out the impossibility of the parties agreeing on health insurance for the initial contract before January 2015, when the 2015 healthcare modifications were to be implemented). (Id.).

Rodriguez also spent a good amount of time explaining and discussing with Valero the substance of the 2015 changes as set forth in his October 8 letter to Valero, including but not limited to, the overall 6-percent increase in costs to employees. (GC Exh. 4; R. Exh. 2). There is no dispute that Valero admitted that the 6-percent increase in overall health benefits premium was a "good deal," given that other health plan increases that he had seen were much higher, from 9–11 percent. But, he also voiced the Union's main concern that the flex plan changes every year, and that he wanted more of a plan with fixed costs for 3–5 years. He ultimately promised that he would provide Respondent with a counterproposal for an entirely different health plan—Team Care under Central States Health and Welfare Fund. According to Valero, union employees in other of its UPS subsidiaries had been put into Team Care. This transition for unionized employees at other UPS business units occurred, however, after those companies

[8] Valero admitted that his notes did not reflect all that was said during the bargaining. In fact, he did not remember many of the details discussed; he recalled that Rodriguez offered only one reason for not accepting any of the Union's proposals, and flat out rejected all other proposals without any explanation. It is implausible that Respondent did not provide reasons or explanations for rejecting all but one of the Union's proposals. This is supported by Respondent's credited bargaining notes, the length of the meetings, and Valero's sometimes inconsistent and evasive responses (discussed further in this decision).

[9] Rodriguez testified that the first thing he wanted to do "was make sure I didn't waive any arguments from the previous case. So I told them that our position was we weren't obligated to bargain over these changes because it's part of the longstanding past practice status quo, but that we were very much there in good faith and—and looking forward to try to reach some kind of compromise." (Tr. 165–166).

and the union executed an initial contract.[10]

Rodriguez advised that a commitment to the 2015 changes would not waive the Union's rights regarding any future changes, and they would be able to bargain over any 2016 changes, as well as the overall initial contract healthcare.

During this meeting, Respondent also provided documentation in response to the Union's information request referred to above. (R. Exh. 1). He confirmed that other than the 2014 changes and the recommended 2015 changes, the flex plan SPD remained as it was in 2013. Valero asked for a breakdown of the employer's contributions, the employees' contributions, and whether these contributions were biweekly or bimonthly. Rodriguez pointed out that this information could be ascertained from the documentation, which showed the annual 100 percent COBRA prices for the flex plan's 2014 and 2015 medical, dental, and vision benefits; the employer's annual contributions for those benefits for 2014 and 2015; and the employee contribution for those benefits for the 2 years.[11] He explained that by dividing the employer's and employees' annual contributions by 12, the Union would have the monthly contributions. (Id.). A review of those documents shows that they do reflect the annual employer and employee contributions. However, Valero testified that he did not understand Respondent's calculations, and wanted Respondent to do the math. He did not, however, make an additional information request or file a charge regarding any failure on Respondent's part to produce information. Nor did he reflect in his own notes the need to get additional information from Respondent. In fact, Valero testified that he did not do so because he orally received all of the information that he needed. (Tr. 83, GC Exh. 10).

Respondent's bargaining notes show that Rodriguez asked Valero if the Union would be agreeable if the bargaining unit was put into TeamCare, and Valero replied, "maybe." During the break, Respondent's representatives caucused. On return, Rodriguez expressed Respondent's concern that carving out the 30 or so unit employees from the flex plan which covered thousands of UPS and putting them in another plan would result in "astronomical" premium and administrative costs for Respondent, and require "a manual piece for claims and there is not a viable [option] available in doing that." He said that if the Union took the 2013 SPD, in addition to the 2014 changes, which would remain, and the proposed 2015 modifications, the Union could shop around for the same benefits, but would not get "anywhere close to the same prices." Valero reiterated his main concern was that the flex plan changed every year. Rodriguez responded that "[w]e are racing against the clock there has to be an open enrollment period so we would like to go through that process with you." In addition, he later noted that he wished the parties had reached an initial agreement, but that overall "[h]ealth insurance is a hard thing to bargain. It's not going to happen overnight." (R. Exh. 2). In turn, Valero said that he was "going to try and submit everything to the insurance to shop around the prices. Then if they have

[10] According to witness Barbara Jill (B.J.) Dorfman, UPS' director, U.S. Benefits, only nonunion employees at UPS Small Package and Freight subsidiaries are covered by the flex plan. She verified that in the past, when employees covered by the flex plan became unionized, they negotiate for a different health plan (such as TeamCare under Central States) through their collective-bargaining agreements. Dorfman manages UPS' healthcare group, and assists in developing healthcare strategies, plan designs, and employee contributions (Tr. 149, 152–155; R. Exh. 2).

[11] Here, the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") rates reflect the total cost of the flex plan's costs for medical, dental, and vision benefits. (R. Exh. 1, pp. 1-2).

questions I will send to you and you can give an answer." He also said that he would "send all this information. If Aetna or somebody else we can get the same plan and . . . we can get a plan to avoid changes year by year." Rodriguez promised to give Valero any relevant information, claiming that he was "glad we got the process started and this is a good first step." (Id. at 5-6).[12] Valero also asked about the employer paying the full premium for employees, but the parties concluded for the day.

There is no dispute that during bargaining for these 2015 modifications, the parties continued to bargain (e.g., on October 14 and 15) on some of the noneconomic issues in the overall initial contract, and reached tentative agreements on at least a few of them. (Tr. 91- 93, 95).

2. Second Bargaining session on October 17

On October 17, Rodriguez, Ramson, and Darren Jones met with Valero at Rodriguez' Doral, Florida firm at about 3:16 p.m. Union team member Eddy Valdez joined about an hour later. (R. Exh. 3). Rodriguez began by telling Valero that Respondent was trying to work with him. He reiterated that Respondent did not think it was legally obligated to bargain "based upon status quo," and stated that the "changes will go into effect in January 2015. This is a time sensitive matter and we look forward to hearing from you today." (R. Exh. 3.)

According to Respondent's bargaining notes and Valero's testimony, Valero stated that the Union viewed the flex plan as a "management plan," that no other bargaining units in the country were under. He repeated the Union's position that it wanted to either negotiate the entire health package, with a 3–5 year fixed plan, or revert back to the 2013 plan until the parties negotiated an initial contract. Rodriguez reminded Valero that they were only negotiating the proposed 2015 changes, and that Respondent would not accept returning to the 2013 plan, which no longer existed. (R. Exh. 3).

Valero presented Respondent with UPS' Team Care plan rates over 3 years: $363.82 currently; not to exceed $421.12 on August 1, 2016; and not to exceed $461.92 on August 1, 2017. Valero characterizes the TeamCare plan as being 3 years fixed with no changes; however, it increases up to a fixed amount each year. Rodriguez responded that the Central States required the parties to have a ratified contract in place. He explained that although Respondent would consider the proposal,

> if we were going to agree to them the changes under the flex plan would be moot. What we are focusing on was the changes to 2015 to shop if there was a cheaper way to do it. What i[t] sounds like you shopped for a new plan I think you are right there is no bargaining unit besides SCS in the Flex Plan but we think that the

[12] I credit Rodriguez' testimony that Valero said that he would shop around for a different plan, as it is supported by Respondent's bargaining notes. Although Valero only recalled promising to submit a counteroffer regarding TeamCare insurance, he initially admitted telling Rodriguez that he would "shop" around. (Tr. 63, 68; R. Exh. 2).

> bargaining unit should be in [their] own plan. Right now we are only looking for 2015 changes.

(Id.). Valero accused Respondent of not previously explaining that the flex plan changes every year, and said that he would "consider, but not saying I will not agree, that the plan would stay as status quo since the day of the election and take out the smokers program for $150 and put back working spouse."[13] At that point, Valero unequivocally stated that the Union was rejecting Respondent's plan changes, and did not want any increases in the plan unless the employer paid for all of them. He also advised that "[l]et me put on the record I am not interested in staying in the Flex benefits plan. No interest at all." (Id.).

Rodriguez said that "[w]e are not going to jump to another plan before January 2015. Economically we can't jump to that because practically we don't think it will work. We will discuss if the employer [eats] the costs." Valero questioned why Respondent had not made increases in unit employees' wages like it did with health care, to which Rodriguez explained that pay increases were not an automatic or recurring event. Rodriguez said that he hoped the parties could reach an agreement, but admitted he could not guarantee the costs would remain the same. (Id.)

Before taking a break, the parties clarified the two proposals for Respondent to consider: putting unit employees into the TeamCare plan or keeping them in the precertification plan and trying to reach a tentative agreement in 2015. (Id.). After the hour break, Rodriguez explained again that the unit employees were not eligible to be moved into Central States' TeamCare plan at the time because the parties had not executed a collective-bargaining agreement. He also told Valero that Respondent rejected TeamCare in favor of the flex plan because the flex plan was easier to administer, and saved money by spreading the risk among so many more employees. In addition, Respondent rejected returning to the 2013 plan because it would also mean creating a similar, separate plan with huge costs for a few unit employees. Rodriguez recommended the "best thing to do is to let the changes happen. Let's get a deal on healthcare. We can start with healthcare first when we discuss economics [during the initial contract talks]." (Id.)

Valero voiced his concern that putting the flex plan modifications on the table and suggesting they make the changes "without negotiations" was "not bargaining" to him. He complained that the employer wanted more changes, but had not increased wages in 2 years. He did not understand why it would be unreasonable or a problem to carve out the 30–40 unit employees as the Union had done with a similar number of employees at the airport (air cargo). Rodriguez responded that Respondent did not take a position that putting the unit employees into another plan was unreasonable and that "we may very well end up where you want." (Id.)[14]

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[13] Based on the evidence, the hearing on the 2014 changes, and Valero's subsequent statement that "you guys have made changes year to year in healthcare plan," Valero and the Union knew there might be changes in the flex plan each year.

[14] Throughout bargaining, Rodriguez emphasized that Respondent was there to negotiate the 2015 plan changes. (Id.) Although Rodriguez had repeated that Respondent believed they did not have to bargain, Respondent never, as Valero described, said that they refused or would not bargain. (R. Exh. 3.)

In this meeting, Valero also proposed the following: trade wage increases for the flex plan changes; prepare a "side letter" to get to healthcare in 2015, and continue to negotiate while "[reserving] the right" to reject the changes; and place unit employees in another plan such as Aetna that might not change every year. After a short break (17 minutes), Valero went into Respondent's conference room, and proposed that Respondent reduce the amount of the unit employees' out-of-pocket payments for health care. Rodriguez related back Respondent's responses to the three proposals. Regarding wage increases, he stated that wages "were a significant economic consideration," and that "[e]conomics at the 116th street location [Doral facility] is not pretty and we anticipate that wages and health insurance [is] going to be more than it is now and we can't agree now." He explained that they also considered Aetna and Cigna, but discovered that they also change every year. Finally, he indicated that lowering the unit employees' contributions would require putting them into a separate structure because the flex plan did not allow for them to have different contributions. Rodriguez summarized that any change to reimbursements, transition to another plan, or going back to the precertification benefits would require removing the unit employees from the flex plan and putting them into a new one. (Id.). Valero testified that he did not recall Rodriguez offering these explanations at the bargaining table, but I believe that Rodriguez gave reasons for rejecting the proposals as his testimony is supported by Respondent's bargaining notes for the first two sessions.

Valero expressed hope that the parties would reach an agreement, but advised that if Respondent implemented changes, the Union would have to file a charge. To that, Rodriguez asked if they were at a "dead end," and Valero responded, "[n]ot on my part." Rodriguez promised to check further into having the employer pay a portion of the unit employees' healthcare premium contributions, and Valero said that he would ask Central States to be available by telephone at the next session. Valero also promised to send Rodriguez a copy of the TeamCare plan later that evening, which he did. (Tr. 46.)

3. Third bargaining session on October 20

On October 20, the parties' representatives met at the same facility for their third scheduled bargaining session. Rodriguez and Jenny Schaffer (and possibly Jones) were present for Respondent. Schaffer took notes, but those notes were not submitted. Valero and Juan Nunez were present for the Union.[15] According to Rodriguez, he laid out for the Union the reasons why Respondent could not accept moving unit employees into a different plan. They included the huge amount ($100,000 to $150,000) that the administrator, Aon, would charge to set up and administer a separate plan or contribution structure, the challenges and risks of having to manually handle claims, and other associated costs of doing so. I credit this testimony for the reasons set forth below.

Valero requested that the employer pay about half of the unit employees' portion of health insurance. According to Valero's notes, Respondent was not willing to pay additional costs for health insurance. (GC Exh. 12). However, Rodriguez testified that he also reiterated Respondent's economic concerns about the Doral facility, and how Respondent was reluctant to

[15] Valero recalled that Tom O'Malley was also present, but his notes did not reflect his presence. Rodriguez did not recall O'Malley's presence, only that of Schaffer and possibly Darren Jones. Nevertheless, only Rodriguez and Valero spoke at this and the first two sessions.

commit to paying all or a greater portion of healthcare premiums at that time. He previously testified that such increases would have been equivalent to about a 10 percent wage increase, and recalled explaining this to Valero at some point during negotiations. (Tr. 183-185). Rodriguez did not, however, make any counteroffers on behalf of Respondent, and instead, asked the Union to allow the 2015 health care changes to take place.

Valero became frustrated and pointed out that the Union had put six proposals on the table, but that Respondent had rejected them all without putting forth any counterproposals. He admitted that he told Respondent's team that if Respondent was going to maintain its only position to move forward with the proposed 2015 flex plan changes, they might as well just cancel the next bargaining session scheduled for October 21. Rodriguez agreed, and the parties canceled the next session.

In this last session, Valero also stated his belief that by its actions, Respondent had not bargained in good faith, and reiterated his intent to file a charge with the Board if Respondent went forward with the 2015 flex plan changes. (GC Exh. 12).

E. Post Bargaining Correspondence

By letter to Valero dated October 22 , Rodriguez confirmed his understanding of Valero's statement on October 20 that they had reached a deadlock, and his (Rodriguez') agreement, that the parties had reached an impasse over the proposed 2015 modifications to the flexible benefits plan. He reminded him that although the Company believed that it had no obligation to bargain over these changes "(because the modifications were a part of a longstanding past practice), the Company was willing and available to bargain with Local 769 over the modifications." Rodriguez went on to summarize his recollection of each of the three bargaining sessions. (GC Exh. 6.) He stated that if Valero "[disagreed] with any of the facts stated in this letter, please let us know no later than Monday, October 27, 2014. Otherwise, we will conclude that the facts stated in this letter are true and correct." Rodriguez ended the letter by advising that since the parties were at impasse over the 2015 modifications, Respondent would begin open season on October 27, and that prior to enrollment, it would provide Valero with the enrollment materials. (Id.).

On the same day, Valero emailed Rodriguez that due to the weekend and travel, he needed more time to respond to the October 22 letter, and that he would "probably respond" no later than the close of business on October 29, "or before if possible." (GC Exh. 7.)

Rodriguez replied, via email, on October 23, that he just wanted Valero to let him know by October 24 what, if anything, he disagreed with in his October 22 summary of events. He stated that there was no dispute that they had reached an impasse at the bargaining table. Further, he said that Valero knew that "time is of essence because the open enrollment must take place soon. Consequently, we expect to proceed as stated in the letter." (GC Exh. 8.)

By an October 28 email response to Rodriguez' October 22 letter, Valero wrote that "[t]he Union is in disagreement as to your position that the company has no obligation to negotiate the health insurance. I can agree we are at an impasse in regards to the health

insurance." (GC Exh. 9.) He set forth some of the proposals that the Union made during bargaining, and stated that Respondent had rejected each one. The Union's position was that "[o]n account of your actions through these negotiations in regards to the health insurance there is no good faith on your part to negotiate. Basically, regardless of any proposal on the table in regard to the health insurance the answer from the employer will be no." Valero reiterated his promise that if Respondent implemented any of "these non-negotiated changes towards health insurance," he would file charges with the Board. (Id.). Otherwise, Valero did not dispute or disagree with Rodriguez' rendition of the bargaining table discussions, nor did he deny that Respondent provided the reasons for rejecting the Union's proposals during negotiating sessions.

F. Respondent Implements Proposed Healthcare Changes

In October 2014, Respondent sent its employees, including the unit, an annual enrollment notice regarding the flexible benefits plan. The notice announced its employees' "annual opportunity to make changes to [their] coverage under The Flexible Benefits Plan," and enclosed the summary of material modifications (SMM) "outlining changes to the Plan, effective January 1, 2015." The active annual enrollment period for the 2015 benefits ran from October 27-November 7, 2014. The notice also warned that if employees failed to enroll in benefits within the specified period, their spouses would not be eligible for benefits and employees would be deemed tobacco users and charged the tobacco premium increase. (GC Exh. 13.)

As of about January 1, 2015, Respondent implemented (and has maintained) the 2015 changes to unit employees' health care benefits as proposed and described above.

G. Credibility[16]

The only factual dispute here is whether Respondent, during the three bargaining sessions, explained why it rejected each of the Union's proposals. There is no dispute that the Union offered several proposals and that Respondent rejected them. Rodriguez testified that he listened to, sought advice from Dorfman and others at UPS, considered, responded to, and provided an explanation for rejecting each of the Union's proposals. Valero claimed that other than telling him the parties were not eligible for TeamCare, Respondent rejected the Union's proposals without explanation.

As previously stated, where Rodriguez and Valero differ regarding the substance of the bargaining sessions, I have credited Respondent's version of events based on Respondent's detailed bargaining notes. Valero testified that Respondent only provided explanations in Rodriguez' October 22 letter, and not at the bargaining table on October 12, 17, and 20. This is doubtful, however, since credited bargaining notes show otherwise. And contrary to his testimony, Valero eventually admitted that Rodriguez told him that the Aetna and Cigna plans changed every year as did the flex plan. (Tr. 84, 113). Further, Valero did not dispute (in his

[16] I have made specific credibility determinations based upon a review of the entire record and all exhibits in this case. I have also utilized witness demeanor and inherent probability of the testimony to assess credibility. Testimony contrary to my findings has been discredited in some instances because it was in conflict with credited testimony or documents or because it was inherently incredible or unworthy of belief.

October 28 response) Rodriguez' October 22 summary of the negotiating session discussions, which included Respondent's reasons for rejecting each of the Union's proposals.

I do not expect the parties to recall everything discussed several months before; however, I find it unbelievable that Valero did not recall so much of what was said. In addition, he sometimes failed to answer the questions asked, or appeared to evade doing so. For example, at first he did not recall any exchange about COBRA rates and payments by the Company and employees under the flex plan documents provided by Respondent. But on further questioning, he admitted and recounted details of such discussion. (Tr. 63–65; R. Exh. 1). Further, Valero's testimony that Rodriguez never mentioned the huge administrative costs associated with moving unit employees into TeamCare or another plan is not supported by Dorfman's testimony. Dorfman confirmed that Respondent's bargaining team consulted with her during the bargaining sessions at issue here. She testified that she advised them that either putting unit employees into a new plan or changing their contribution payments would require UPS' eligibility and enrollment healthcare plan administrator, AON, to set up a new structure at a cost upwards of $100,000 to $120,000 or more. According to Dorfman, this did not include similar costs for the benefits administrator (insurance company) to set up a new structure or contribution plan for unit employees. (Tr. 156–157; 225–228). Valero even recalled Rodriguez admitting that he was "not an expert in the plan," and having to "step out, make calls and come back." (Tr. 59.) It is unbelievable that Rodriguez would have asked for and received this information from Dorfman, and returned to bargaining without sharing any of it with the Union.

Valero testified that Rodriguez could have "contacted Central States and asked them for a participation agreement because we don't have a CBA in place." When asked by me if he mentioned this alternative to Central States' eligibility rule during bargaining, he indicated that he had. When asked by Respondent's counsel, he admitted that he had not. Next, Valero did not recall Rodriguez telling him that the economic situation at the Doral facility "wasn't pretty." He then tried to explain that he was not denying that Rodriguez might have raised economics as an issue with any of the Union's proposals. Rather, he did not believe that the facility was having financial difficulties since Respondent had returned some previously laid-off employees to work. (Tr. 118–120.) Nevertheless, Valero knew there had been layoffs at the Doral facility due to a decline in work. Therefore, I credit Rodriguez' recollection that Respondent considered all of the Union's proposals, and communicated reasons during the bargaining sessions for not accepting them.

III. ANALYSIS AND CONCLUSIONS

The General Counsel contends that Respondent approached bargaining predetermined to implement its proposed 2015 modifications to the flex plan, without making an honest, good-faith effort to reach agreement on those changes. In other words, the General Counsel argues that Respondent "went through the motions of bargaining," and that while the parties were at impasse on October 20, impasse was reached in bad faith on Respondent's part. The General Counsel believes that its position is evidenced by Respondent's past unremedied unfair labor practices involving its 2014 unilateral changes as set forth in Judge Sandron's decision; Respondent's belief that it has no obligation to bargain over its longstanding practice of healthcare changes; Respondent's rejection of the Union's proposals during bargaining over the 2015 changes; and Respondent's failure to make any counterproposals. (GC. Br., p. 19.) In its

defense, Respondent contends that it made a genuine effort to bargain in good faith by giving adequate notice; meeting with the Union; seriously considering and responding to all of the Union's proposals; agreeing with the Union that the parties had reached impasse; and overall bargaining with the Union in good faith.

A. Legal Standards

1. Unilateral change exception

Generally, an employer violates Section 8(a)(5) of the Act by changing a mandatory term or condition of employment without first giving the representatives of its employees notice of the proposed change and an opportunity to bargain to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962).[17] It is also a general rule that when parties negotiate towards a collective-bargaining agreement, the employer must not implement changes, or even discontinue an established practice, until an impasse has been reached on the entire agreement. In other words, the employer is typically precluded from implementing proposals on certain subjects carved out of the overall contract such as health and welfare programs. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).[18]

In certain cases involving a first contract, however, the Board has permitted an employer's implementation of such a proposed change in the absence of an overall impasse on the entire agreement if the proposal concerns a discrete annually recurring event that coincidentally occurs during contract negotiations. *Stone Container*, 313 NLRB 336, 336 (1993); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776, fn. 2 (2006). In *Stone Container*, the Board found lawful the employer's notice to the union, during first contract negotiations, that it would be discontinuing an annual wage increase due to economic conditions. In that case, the Board determined that the notice allowed enough time to bargain, the union made no counterproposal, and the union failed to raise the matter at issue during future contract negotiations. Since *Stone Container*, the Board has extended its principles where proposed changes involve healthcare benefits, terms, premiums, and overall coverage. *St. Mary's Hospital of Blue Springs*, above; *Saint-Gobain Abrasives*, 343 NLRB 542 (2004); *Brannan Sand & Gravel*, 314 NLRB 282 (1994) (found no duty to refrain from implementing proposed healthcare changes, similar to annual wage increases in *Stone Container*, until impasse reached on overall contract negotiations).

Most recently, the Board rejected the administrative law judge's "fait accompli" finding, and affirmed its application of *Stone Container* and *Brannan Sand* "as the governing law" where parties are engaged in first contract negotiations, and there is evidence of the employer's "past practice of annually reviewing and modifying its healthcare and wellness program." *Sutter*

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[17] It is undisputed, of course, that health insurance benefits such as those at issue in this case, constitute a mandatory term of employment. *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (changes in drug prescription program).

[18] The two main exceptions to this rule are that the union engaged in delay tactics or that the employer had economic exigencies that compelled prompt action. See *Bottom Line Enterprises*, above at 374; *Pleasantview Nursing Home*, 335 NLRB 961, 962 (2001), revd. in part on other grounds 351 F.3d 747 (6th Cir. 2003). Respondent in this case has not claimed either of these exceptions.

Health Central Valley Region, 362 NLRB No. 199, slip op. at 3 (2015). The Board pointed out that current Board law established a unilateral change as a fait accompli "when the announcement or notification is presented as a final decision or the union was not afforded an opportunity to bargain." Id., citing *Brannan & Gravel* at 282 (fait accompli where employer announced healthcare changes to employees, and told union negotiations would be "fruitless" because it would not consider anything else) and *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (2001) (fait accompli where employer announced paid time-off policy as a final decision, ignoring union's bargaining request). There is no evidence of fait accompli in this case, as Respondent did not announce its changes or implement them before giving notice and an opportunity to bargain.

2. Impasse and good-faith bargaining

In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), aff'd, 395 F.2d 633 (D.C. Cir. 1968), the Board established that impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." The Board has also defined impasse as the point in time during negotiations when the parties are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995). In determining when impasse in bargaining existed, the Board considered the following factors: the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Id. at 478.

As the General Counsel points out, "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *White Oak Coal*, 295 NLRB 567, 568 (1989). Further, an employer that has actually committed unfair labor practices cannot "parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Wayne's Dairy*, 223 NLRB 260, 265 (1976).

But, the Board has since held that only "serious unfair labor practices," committed before or during negotiations "will taint the asserted impasse," and preclude unilateral changes. *In Re Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001), citing *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999). In *Alwin Mfg.*, the Court pointed out two ways in which an unremedied unfair labor practice can contribute to inability to reach agreement. "First, an unfair labor practice can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement." *Alwin Mfg.* at 688. The Board in *Dynatron/Bondo Corp.* determined that the central question was "whether the Respondent's unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock." *Dynatron/Bondo Corp.*, above at 752.

Although the parties in this case disagree as to whether Respondent bargained to a good faith impasse, the Board has not specifically set forth requirements of the bargaining to impasse obligation in situations governed by *Stone Container*. Rather, since *Stone Container*, the Board

has found it unnecessary to decide, or otherwise did not reach, the question of whether an employer must bargain to agreement or valid impasse over the discrete, recurring event at issue before acting unilaterally. See, e.g., *Brannan Sand & Gravel*, above; *St. Mary's Hospital*, above at 776 fn. 4; *Saint-Gobain Abrasives*, above at 542 fn. 3; *Sutter Health,* above at 3. In *Saint-Gobain Abrasives, Inc.*, above at 542 fn. 3, the Board noted Member Walsh's view that, "impasse in bargaining [as] a prerequisite to lawful unilateral implementation of a bargaining proposal" existed in cases governed by *Stone Container*, but did not rule on the matter. So we look to Board cases to discern what factors the Board considers in determining whether an employer has given adequate notice and meaningful opportunity to bargain before implementing a discrete recurring event during initial contract negotiations.

In *St. Mary's Hospital*, after bargaining towards a first contract for several months, respondent notified the union on November 4, 2003 of its recommended changes to its parent company's self-funded health care plan, to become effective on January 1 of the following year. The parent company annually evaluated and determined the "plan design" for its fund, including changes to design, premiums, copays, and/or deductibles in about November of each year, to become effective in January of the next year. Between November and December 31 of each year, respondent opened enrollment to all employees. The union rejected the recommended changes, as well as respondent's alternative proposal to provide the union with funds to purchase its own health insurance for its members. When respondent advised that it would move forward with its plan changes, the union offered to agree to the new plan provider lists, but would only accept the plan's current rate levels, without any modifications on January 1. The employer rejected the union's counter offer, and implemented its plan on January 1. *St. Mary's Hospital*, above at 779–781. The Board upheld the judge's finding that respondent gave the union timely notice and an opportunity to bargain over the changes between November 4 and January 1. In doing so, the Board considered several factors in the case: respondent's changes were consistent with past practices which occurred before employees were represented by the union; the parties were still negotiating their first contract, but had not reached agreement on health care "by the time the changes at issue would normally have been implemented;" employees would have faced potential disruption in health care coverage had respondent not made changes by January 1; and respondent remained willing to bargain after implementation. Id. at 776. Further, the Board decided that the parties, who had agreed that "time was of the essence due to the January 1, 2003 deadline, had exhausted all possibilities of reaching agreement over the healthcare issue before the deadline." Therefore, the Board did not "reach the issue of whether the Respondent was required to negotiate to impasse before implementation, because it is unnecessary to the disposition of this case." Id. at fn. 4, citing *Saint-Gobain Abrasives*, 343 NLRB at fn. 3.

> Citing *Stone Container*, 313 NLRB 336 (1993), the Board in *Saint-Gobain Abrasives* agreed with the administrative law judge that respondent did not violate Section 8(a)(5) and (1) by implementing an interim health insurance program in November 2002. It also adopted the judge's ultimate finding that the parties were at impasse on November 15, 2002, when the Respondent announced its intention to implement changes to its health insurance program. The Board recognized respondent's annual process of reviewing and adjusting its health insurance plans, and therefore found that respondent was not obligated to refrain from implementing its changes until an impasse had been reached on the collective-bargaining agreement as a whole. In doing so, the Board found it was "unnecessary to the disposition of the case," to decide whether or not respondent was required to negotiate to impasse before implementation. In that case, the union essentially rejected the employer's interim healthcare insurance plans, and instead was only willing to propose and bargain on healthcare and other terms of employment as a part of an agreement for a

multiyear contract. *Saint-Gobain Abrasives*, above at 555.

In *The Neighborhood House Assn.*, 437 NLRB 553, 554–555 (2006), the employer gave the union notice of its plan to implement a 2.2 percent COLA increase only if the union agreed to end the issue for the year. The union would not agree to such, and the employer decided not to go forward with the increase. The Board determined that respondent bargained in good faith since it did not refuse to continue to bargain over the COLA issue during initial contract negotiations; and in fact, indicated that it would withhold the increase, but continue to bargain over the amount of the increase during contract negotiations. Id. at 556.

In *Sutter Health*, the Board decided that respondent timely notified the union about proposed changes in the latter part of September, immediately after it had finalized the details of the changes and sufficiently bargained with the union. The Board took into account respondent's offer to delay the enrollment period to allow for additional bargaining time, as well as respondent's offer to set aside separate negotiating sessions to discuss the proposed changes. The Board also considered respondent's notification to unit employees that it would not implement 2013 healthcare changes until it gave the union a full opportunity to bargain. The Board emphasized that respondent sufficiently informed the union of the details of its proposed changes 6 weeks before the planned commencement of enrollment and over 3 months prior to implementation. Moreover, it was significant that respondent made it clear that it would continue to bargain over healthcare and wellness programs and an initial contract.

Although the Board has established the exception for making unilateral changes as set forth in *Stone Container*, it has not relieved either party of its duty to bargain in good faith on the recurring event at issue. In addition, the Board considers whether or not the parties reached impasse prior to the deadline for the change to take place.

B. Respondent Did Not Violate the Act When It Implemented Its Healthcare Changes

1. Respondent provided appropriate notice and an opportunity to bargain

The parties here were in the midst of initial contract negotiations when Respondent notified the Union that its plan sponsor had recommended modifications to the flex plan to take effect in January 2015. The parties agree that Respondent had a longstanding practice of annually reviewing and making changes to its health care plan. They also agree that Respondent could implement such changes, absent an overall agreement, provided it gave the Union adequate notice and an opportunity to bargain towards an interim agreement on 2015 flex plan provisions.[19] Therefore, I find that the *Stone Container* is applicable here.

Based on *Sutter Health* and other cases discussed above, I find that Respondent gave the Union sufficient notice of its proposed flex plan changes. Respondent notified the Union of the changes on September 19, 2014, indicating availability to begin negotiations as early as September 25, 26, 27, 28, or 30. (GC Exh. 2). On October 8, 2014, Respondent gave the Union written details of its recommended flex plan modifications which would take effect on January 1, 2015. (GC Exh. 4). The parties ultimately agreed on bargaining sessions for October 12, 17, 20, 21, and 22. Thus, Respondent gave notice three months prior to implementation, and provided the opportunity to bargain, beginning on October 12, approximately 2 months prior to the

[19] Respondent ultimately took the position in this case that it had an obligation to bargain with the Union "without prejudice to it[s] position in the 12–CA–13671 [case] that a unilateral change made pursuant to a long-standing practice constitutes a continuation of the *status quo* and is not a violation of the Act." (R. Br., fn. 13, citing *Courier-Journal*, 342 NLRB 1093 (2004).

planned implementation. This notice timeframe was similar to, and greater in some cases, than that given in some of the Board cases cited above. See e.g., *St. Mary's Hospital*, above (proposed changes implemented within 2 months of notice to union) and *Sutter Health*, above (notice to union within 6 weeks of planned enrollment and 3 months of planned implementation). Moreover, it was Respondent's past practice to send to all of its employees an announcement of changes in its healthcare benefits, or summary of material modifications (SMMs), in September or October of each year for the changes to be implemented the following January. There is no evidence, as the General Counsel implies in its brief, that Respondent could or should have notified the Union and initiated bargaining earlier than it did on September 19.

Next, Respondent met with the Union on October 12, 17, and 20, presented its plan in detail and listened to all of the Union's proposals. The General Counsel did not present any evidence that Respondent's bargaining representatives did not actually discuss and consider among themselves each of the Union's proposals. Rather, the evidence shows that Respondent's bargaining representatives caucused an hour or more during each negotiation session, and returned to the table with information and explanations for why it would not accept the Union's recommendations. I have discredited Valero's testimony that Rodriguez provided virtually no explanations for not accepting any of the Union's proposals, and found it unbelievable that Respondent did not do so. If it did not do so, there is no evidence that the Union representatives sought Respondent's reasons for rejecting the proposals. Respondent in this case even provided the Union with responses to its information requests. Therefore, I find that Respondent provided the requisite notice and opportunity to bargain.

2. Respondent did not fail to bargain in good faith

The General Counsel first argues that Respondent's failure to remedy past unfair labor practices in connection with its 2014 flex plan changes, pursuant to Judge Sandron's decision, precludes a lawful impasse. It is established Board law that an administrative law judge decision that is pending before the Board on exceptions is not binding authority and should not be cited as such. See *Healthbridge Management, LLC*, 362 NLRB No. 33, slip op. at 1 fn. 3, citing *St. Vincent Medical Center*, 338 NLRB 888 (2003). Therefore, Judge Sandron's decision and recommended remedies are not binding in this case.

Notwithstanding that pending decision, I find that if Respondent did violate the Act by unilaterally implementing the 2014 changes to the flex plan, such violation was not serious enough nor did it taint the bargaining process such that it would preclude lawful impasse. See *Alwin Mfg.*, above. The General Counsel mostly relies on *Dynatron/Bondo Corp*., above, to support its position. In that case, the parties had been bargaining on an initial contract for about 3 years when respondent declared an impasse. The Board applied *Alwin Mfg., above*, and concluded that in light of "ample evidence that the Respondent's conduct made it harder for the parties to come to an agreement," respondent "could not, and did not, reach a good-faith impasse." Those rather extreme unremedied unfair labor practices included respondent's refusal to bargain after the union's certification in June 1991; respondent's failure to meet with the union until July 1993; numerous unilateral changes to terms of employment, including but not limited to, amending the smoking policy to begin the day after bargaining; and respondent's continued discrimination against employees who supported the union. They were affirmed by

the Board, and some, if not all, were enforced by the Eleventh Circuit Court of Appeals. Further, respondent continued to implement additional unilateral changes such as increasing employees' health care contributions. *Dynatron/Bondo Corp*. at 752–753. Therefore, the Board found that respondent was not "entitled to implement its final contract proposals." Id. Unlike *Dynatron/Bondo Corp*., there is no evidence in this case that Respondent violated the Act on numerous occasions, or that Respondent defied numerous Board and Court orders and continued to present and make unilateral changes in wages, health coverage, and other terms of employment without notice and bargaining opportunity.[20] Respondent opted not to remedy Judge Sandron's recommended findings regarding its 2014 health plan changes, and preserved its defense in that case pending before the Board. Although Respondent prefaced bargaining with its belief that it did not have a duty to bargain due to past practices, Respondent also advised that it was ready and willing to discuss and bargain over the 2015 proposed changes. Moreover, I find that Respondent engaged in bargaining with the Union, and did not shut down bargaining over healthcare after January 1.

Further, the evidence does not show that failure to comply with Judge Sandron's recommended order interfered with the parties reaching an agreement. One of the Union's proposals was to return the flex plan to what it was in 2013, thereby removing the smoker's penalty and spousal limitation changes implemented in 2014. And, at one point, Valero indicated that the Union would not agree to any new changes until Respondent did so. However, Valero continued to present additional proposals that did not involve returning to the flex plan as it was in 2013 (e.g., moving unit employees to a new plan or having Respondent pay all or half of the unit employees' 2015 contributions). The main point of contention appears to have been the flex plan itself, which the Union viewed as a management plan versus the TeamCare plan which included unionized employees from UPS's other companies who had previously reached collective-bargaining agreements. Respondent wanted to implement the 2015 health care changes to the flex plan, which it believed was the best plan, with better benefits at lower costs for both the employer and employees. I am not making a determination as to whether that was the case or not, but the record does not reflect that the Union challenged those assertions during bargaining. Additionally, based on the Union's admission that it primarily wanted its SCS members out of the flex plan, there is no evidence that remedying the 2014 unilateral changes would have increased the parties' chances of reaching agreement on the 2015 changes. Nor is there evidence that the 2014 unilateral change moved the baseline for negotiations such that the parties' expectations were detrimentally altered. The 2014 modifications required that spouses utilize their own employers' health insurance plans and $150 smokers' penalty, while the 2015 proposed flex plan involved an overall 6-percent increase in costs to the employees. I find that Respondent's implementation of its 2015 changes, even in the face of its pending Board case over its 2014 changes, is not enough to find that Respondent did not bargain in good faith such as to preclude impasse.

[20] The General Counsel, in its statement of facts (but not in its brief), mentions that the Board found Respondent SCS violated the Act in 2009 in connection with its efforts to oppose union organizing in one of its Miami, FL facilities. *UPS Supply Chain Solutions, Inc.*, 357 NLRB No. 106, slip op. (2011). There was no evidence, however, that Respondent failed to remedy those actions. Despite this history, I still find that Respondent did not act in bad faith. (GC Br. at 2).

Moreover, while *Dynatron/Bondo* involved parties' attempts (or lack thereof) to reach an initial agreement, it is inapposite to the case at hand because the parties were negotiating towards an overall agreement, and not a discrete, recurring event. Thus, the circumstances were not similar to those here or in *Stone Container* and its progeny.

Next, the General Counsel argues that Respondent's failure to bargain in good faith is evidenced by its rejection of the Union's proposals, refusal to explain why it rejected proposals, and failure to present even one counteroffer. The General Counsel contends that these attempts by Respondent's to circumvent its bargaining obligation caused the Union to abandon further negotiations after October 20. I disagree.

I reject the General Counsel's argument that Respondent engaged in bad faith by preserving its position that it did not have to bargain on flex plan changes that were a continuation of the status quo. Nor do I find that articulation of its belief in this case was at odds with its assertion that it was present, prepared, and willing to bargain "in the spirit of good faith and cooperation." Despite its belief and pending exceptions before the Board, Respondent bargained with the Union on three occasions during which it presented its position, listened to the Union, and responded to the Union's proposals. Respondent even expressed its willingness to continue bargaining over healthcare after January 1, and acknowledged that a new plan such as TeamCare was not out of the question for healthcare under the initial contract.

Respondent in this case also advised the Union that time was of the essence because the changes were scheduled to be implemented by the plan sponsor on January 1, 2015, in order to prevent any lapse in coverage. The Union essentially proposed that Respondent place unit employees in an entirely different plan such as TeamCare or Aetna; put them into the same or similar plan with the same rates and provisions as in the 2013 precertification flex plan; increase wages in exchange for acceptance of the flex plan because Respondent had not done so in 2 years; or pay all or about half of the unit employees' health insurance premium contributions. Like the employer in *Sutter Health,* Respondent also rejected the Union's proposals and gave reasons for doing so. As previously stated, those reasons included the high costs and administrative barriers associated with either transferring employees into a new plan or changing the contribution scheme for some employees and not others. Overall, Respondent asserted that the flex plan was a better plan for the cost and benefits provided. In fact Valero conceded that an overall 6-percent increase in plan costs for employees was a good deal compared to most plan changes that he had seen.

The General Counsel's argument that the totality of the circumstances here are in sharp contrast to those in *Sutter Health*, is without merit. The General Counsel argues that unlike the employer in Sutter Health, Respondent showed no flexibility in its timeline for bargaining. I disagree. The employer in that case extended the deadline to begin enrollment; it did not offer to extend or extend the timetable for implementation of its 2015 change to a new health plan. Here, it was the Union who first determined that the parties had reached the end of their bargaining rope, and that further meetings would be a waste of time. In addition, the General Counsel asserted that Respondent conditioned bargaining on economic issues on resolution of noneconomic matters. I dismiss this assertion in that the parties were in fact bargaining over an economic issue—healthcare insurance to include premium increases. Further, in the cases on which the General Counsel relied, the respondents had refused to discuss any economic issues at

all during negotiations on the overall contract until the union had agreed to certain noneconomic matters. See *Erie Brush & Mfg. Corp.* , 357 NLRB No. 46 (2011) (employer refused to bargain on economic issues until the union changed its position on union security); *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034–1035 (1986) (employer unlawfully refused to discuss economic items until the union agreed to no-strike and binding arbitration provisions). Here, the parties previously agreed to first address noneconomic issues for the overall initial contract, and had not yet reached economic provisions such as wages. Nonetheless, Respondent considered and rejected with explanation all of the Union's offers.

The Board has established that the duty to bargain in good faith does not require an employer to make major concessions or withdraw from its initial bargaining position. *Atlanta Hilton Tower*, 271 NLRB 1600, 1603 (1984). *Atlanta Hilton Tower* does not involve a discrete recurring event arising during initial contract negotiations; however, the Board set forth several examples of bad faith conduct during bargaining such as "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting." I agree with Respondent that the General Counsel has not shown that its reasons for rejecting the Union's proposals were harsh or unreasonable, nor has it shown that during bargaining for the 2015 changes Respondent engaged in any of these other types of conduct. Both parties have a duty to negotiate with a 'sincere purpose to find a basis of agreement,' but 'the Board cannot force an employer . . . to adopt any particular position.' Id. citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953). Therefore, I find that Respondent did not fail to bargain in good faith.

3. The parties bargained to a valid impasse

Since I have found that Respondent bargained in good faith, I also find that the parties bargained to a valid impasse on or by the October 20 session, and that there is no evidence that had they continued to bargain, they would have reached an agreement before the January 2015 flex plan changes were due to go into effect. Thus, the parties in this case exhausted all possibilities for reaching an agreement prior to the January 1 deadline for implementation.

Regarding the factors set forth above for determining if parties bargained to impasse, I find that although the parties litigated the 2014 unilateral changes, they have continued to meet and bargain towards a first contract on a regular basis since 2013. In fact, they continued to meet and even reach tentative agreements on noneconomic issues while negotiating the 2015 flex plan changes. A review of cases adopting the *Stone Container* exception shows that the length of negotiations is not determinative as to whether the parties reached impasse. The 2015 healthcare changes were certainly important, and promptly dealt with as such. Finally, the parties clearly understood they reached impasse. The Union believed that further bargaining was futile, and recommended that the parties cancel all future meetings, and Respondent agreed as evidenced by Respondent's credited bargaining notes, Valero's testimony, and the parties' post interim healthcare bargaining correspondence.

In this case, there is no doubt that both parties began bargaining with agendas for which each had strong philosophical and economic beliefs. Further, there is little doubt that both Respondent and the Union stayed with their respective opposing positions throughout bargaining, though the Union showed movement regarding the employer paying some or all of employee contributions. However, as discussed, Respondent remained open to not only negotiating healthcare for the overall collective-bargaining agreement, but also to future consideration of a plan other than its flex plan. In conclusion, I find that the evidence supports a conclusion that a valid impasse existed prior to the planned implementation date for the 2015 healthcare changes.

Because the 2015 changes to the flex plan constituted a discrete event that was scheduled to recur during negotiations for an initial contract, Respondent was free to implement its proposal so long as Respondent provided the Union with reasonable advance notice and an opportunity to bargain. The Respondent met its obligation in this case. Accordingly, I find that Respondent did not violate Section 8(a)(5) and (1), and I recommend dismissal of this complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. December 24, 2015

Donna N. Dawson
Administrative Law Judge

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.